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May 10, 2021

Public Utility Commission
Central Records
1701 N. Congress Avenue
Austin, Texas 78701

Re: Project No. 51812, *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*; Notice of Appeal of Exelon Generation Company, LLC and Constellation New Energy, Inc. in Cause No. D-1-GN-21-002099; *Exelon Generation Company, LLC and Constellation NewEnergy, Inc. v. the Public Utility Commission of Texas; and, in their official capacities only, Chairman Peter Lake and Commissioners James W. McAdams and Doe*

Dear Central Records:

Attached for filing in PUC Project No. 51812, please find Exelon Generation Company, LLC's and Constellation NewEnergy, Inc.'s Original Petition for Judicial Review, and Alternatively, Suit for Declaratory Judgment which was filed in Travis County District Court on May 7, 2021.

Please let me know if you have any questions about the enclosed.

Yours truly,

Meghan Griffiths

Meghan E. Griffiths

Enclosure

cc: Thomas Gleason, PUC Executive Director — *Via email: thomas.gleeson@puc.texas.gov*
John Hulme, Office of Attorney General — *Via email: John.Hulme@oag.texas.gov*

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CAUSE NO. D-1-GN-21-002099

EXELON GENERATION COMPANY, LLC, and	§	**IN THE DISTRICT COURT OF**
CONSTELLATION NEW ENERGY, INC.	§	
Plaintiffs,	§	
vs.	§	
PETER LAKE, Chair, Commissioner JAMES W. McADAMS, and Commissioner DOE, in their official Capacities as Commissioner of the Public Utility Commission of Texas[1]	§	**TRAVIS COUNTY, TEXAS**
and	§	
THE PUBLIC UTILITY COMMISSION OF TEXAS,	§	
Defendants.	§	**261st JUDICIAL DISTRICT**

EXELON GENERATION COMPANY, LLC'S AND CONSTELLATION NEWENERGY, INC.'S ORIGINAL PETITION FOR JUDICIAL REVIEW, AND ALTERNATIVELY, SUIT FOR DECLARATORY JUDGMENT

Pursuant to the Public Utility Regulatory Act, Tex. Util. Code § 15.001 ("PURA"), and the Administrative Procedure Act, Tex. Gov't Code §§ 2001.035, .038, .171, .174, .176 ("APA"), Plaintiffs Exelon Generation Company, LLC and Constellation NewEnergy, Inc. ("Plaintiff" or

[1] This petition for judicial review arises out of an order issued by the Public Utility Commission during the historic winter storm of February 2021. Subsequent to the storm, the Commissioners who adopted the order—Chairman DeAnn Walker, Commissioner Arthur D'Andrea, and Commissioner Shelley Botkin—resigned. Chairman Peter Lake and Commissioner Will McAdams were subsequently appointed and confirmed by the Texas Senate. A third Commissioner has not been named. The final Commissioner is herein identified as "Commissioner Doe" until such time as the third Commissioner is appointed and confirmed. *Cf* Tex. R. App. P. 7.2 (requiring substitution of a public official's successor when an official ceases to hold office before the proceeding is finally adjudicated).

[2] http://www.ercot.com/content/wcm/lists/227660/Magness_statement_for_senate_energy_and_natural_resources_committee_final.pdf

"Exelon") files this Original Petition for Judicial Review of an order dated February 21, 2021 that removed the monthly cap on default amounts that can be uplifted onto ERCOT market participants in the event of market default (the "Uplift Rule") contained in an order styled as *Order Directing ERCOT To Take Action And Granting Exception to ERCOT Protocols* (PUC Project No. 51812) ("the Order"). Alternatively, Plaintiff seeks a declaratory judgment pursuant to the Uniform Declaratory Judgments Act, Tex. Civ. Prac. & Rem. Code §§ 37.001-011, that the PUC Commissioners acted *ultra vires* in promulgating the Uplift Rule.

I. PARTIES AND SERVICE

1. Plaintiff is a Pennsylvania limited liability company that sells wholesale energy and energy-related products and services in the Electric Reliability Council of Texas ("ERCOT") region of Texas.

2. Defendant Public Utility Commission of Texas ("PUC" or "Commission") is an administrative agency of the State of Texas, created and governed by PURA. Tex. Util. Code § 12.001. Pursuant to Texas Government Code section 2001.176(b) and 16 Texas Administrative Code section 22.22, the Commission may be served with process by serving its Executive Director, Mr. Thomas Gleeson, at the Commission's offices, 1701 North Congress Avenue, Austin, Texas 78701.

3. Defendant Peter Lake ("Lake") is the acting Chair of the Commission; James W. McAdams ("McAdams") and Commissioner Doe ("Doe") are also commissioners. All three are collectively referred to herein as "Commissioners." The Commissioners, sued here in their official capacities only, may be served with process at the Commission's offices, 1701 North Congress Avenue, 7th Floor, Austin, Texas 78701. Consistent with Texas Government Code section 2001.176(b)(2), a copy of this original petition will be filed in PUC Project No. 51812.

II. DISCOVERY CONTROL PLAN

4. In the event discovery is needed, it should be conducted under Level 2 of Texas Rule of Civil Procedure 190.3.

III. JURISDICTION AND VENUE

5. The Court has jurisdiction over this suit for judicial review of the Uplift Rule, which is attached hereto as "Exhibit A." Tex. Util. Code § 15.001; Tex. Gov't Code §§ 2001.035, 2001.038, 2001.171, 2001.174, 2001.176.

6. This is a suit for judicial review seeking a declaratory judgment to invalidate the Uplift Rule, which was a rule adopted by the Commission outside of its statutory or other legal authority and in a manner that did not substantially comply with the mandatory rule-making procedures set forth in APA sections 2001.0225 through 2001.034, including the emergency rule-making provisions, and because the rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, Plaintiff's legal rights or privileges. Tex. Gov't Code §§ 2001.035, .038(a).

7. Alternatively, the Order issued on February 21, 2021 is a final appealable order in a contested-case proceeding. The Order is outside the scope of the Commission's statutory authority and in violation of APA mandatory procedures.

8. Exelon is aggrieved by the Order and is statutorily entitled to judicial review. Tex. Gov't Code § 2001.174; Tex. Util. Code § 15.001.

9. Exelon has exhausted all administrative remedies. Exelon timely filed a motion for rehearing on March 18, 2021. *See* Tex. Gov't Code § 2001.146(a). A copy of Exelon's motion for rehearing is attached hereto as "Exhibit B" and is incorporated herein by reference for all purposes. None of the Commissioners voted to add the motion for rehearing to an open meeting

agenda, rendering it overruled by operation of law on April 17, 2021. On that date, the Order became final and appealable. Tex. Gov't Code § 2001.144(a)(2)(B). This original petition is filed within thirty days of April 17, 2021. Tex. Gov't Code § 2001.176.

10. In the further alternative, this is a suit for a declaratory judgment under the Uniform Declaratory Judgments Act, Tex. Civ. Prac. & Rem. Code §§ 37.001-.011. The Commissioners acted without legal authority in promulgating the Uplift Rule, an *ultra vires* act for which the Commissioners in their official capacities are not protected by sovereign immunity. The Court has jurisdiction over this claim. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 (Tex. 2009) (holding that a suit to require state officials to comply with statutory or constitutional provisions is not prohibited by sovereign immunity and that an *ultra vires* suit must be brought against state actors in their official capacity, even though the suit is "for all practical purposes, against the state.").

11. Venue is mandatory in Travis County, Texas. Tex. Gov't Code §§ 2001.038(b), § 2001.176(b)(1).

IV. BACKGROUND

12. The week of February 14, 2021 brought bitterly cold temperatures to much of Texas, freezing natural gas pipes and knocking out a massive number of power plants needed to heat homes and run businesses. ERCOT has reported that, at its worst, the storm took out 48.6% of the generation available to ERCOT causing it to order firm load shed in order to avoid a near blackout of the entire electric grid.[2]

[2] http://www.ercot.com/content/wcm/lists/227660/Magness_statement_for_senate_energy_and_natural_resources_committee_final.pdf

13. On February 15 and 16, the then-presiding Commissioners on their own motion and without any opportunity for notice and comment changed ERCOT's market pricing rules in response to the winter storm. The Commissioners changed ERCOT's pricing rules by ordering that ERCOT market energy prices must be set administratively at $9,000 per megawatt hour ("MWh"), which lasted for a four-day span from the evening of Monday, February 15, 2021 through the morning of Friday, February 19, 2021. The PUC's February 15 and 16 pricing orders were filed in *Calendar Year 2021, Open Meeting Items Without An Associated Control Number*, Project No. 51617 ("ERCOT Load Shed Rule").

14. ERCOT, the entity charged with administering the electric grid, has since recognized the significant loss of generation during the winter storm was due to weather, equipment failures, and lack of available fuel—not because generators were waiting on the sidelines to see if energy prices would rise. The ERCOT Load Shed Rule is the subject of a related suit for judicial review and a direct appeal to the Third Court of Appeals.[3]

15. The financial fallout from the hastily issued ERCOT Load Shed Rule was swift and dramatic. The single largest electric cooperative in the state defaulted on payments to ERCOT and was forced into bankruptcy. Numerous retail electric providers were wiped out and similarly forced into bankruptcy. Many customers saw electricity bills that were almost 100 times their usual amount—adding insult to injury of enduring blackouts during subzero temperatures. Plaintiff alone faces $900 million to $1.1 billion in pre-tax losses from the entire weather event, including the ERCOT Load Shed Rule. The sustained administrative prices at $9,000 per

[3] *Exelon Generation Company, LLC, and Constellation NewEnergy, Inc. v. Pub. Util. Comm'n of Texas,* Cause No. D-1-GN-21-001772, in the District Court of Travis County, Texas; *Luminant Energy Co. v. Pub. Util. Comm'n of Tex.*, NO. 03-21-00098-CV, in the Third Court of Appeals for the Third District of Texas, Austin.

megawatt-hour ("MWh") for four days straight—the likes of which had never occurred in the market—ultimately resulted in approximately $2.9 billion of default and short payments to those who delivered power the week of the storm.

16. The Uplift Rule stands make the $2.9 billion even greater and exacerbate its impacts on Exelon and other remaining creditworthy ERCOT market participants. On February 21, 2021, after the financial impacts resulting from the PUC's Repricing Order became apparent, the Commission—again, on its own motion and without any opportunity for notice and comment—issued the Order "authorizing ERCOT to use its sole discretion in taking actions under the ERCOT Nodal Protocols ("ERCOT Protocols") to resolve financial obligations between a market participant and ERCOT." The Order hastily gave ERCOT discretion to ignore a laundry list of established ERCOT Protocols related to credit requirements, collateral obligations and, as challenged by Exelon on rehearing, a monthly cap on default amounts that can be uplifted onto ERCOT market participants in the event of market default.

17. The Order was purportedly issued under a Disaster Declaration issued by Governor Abbott prior to storm. The declaration states, in pertinent part:

> [A]ny regulatory statute prescribing the procedures for conduct of state business or any order or rule of a state agency that would in any way prevent, hinder, or delay necessary action in coping with this disaster shall be suspended *upon written approval of the Office of the Governor*.[4]

18. Importantly, the PUC did not obtain written approval from the Governor prior to promulgating the Uplift Rule. Moreover, as demonstrated by ERCOT's own decision to *not*

[4] Governor Abbott Issues Disaster Declaration in Response to Severe Winter Weather in Texas, *available at* https://gov.texas.gov/news/post/governor-abbott-issues-disaster-declaration-in-response-to-severe-winter-weather-in-texas (Feb. 12, 2021). The February 15 and 16 Orders similarly referenced the Governor's declaration, and was also issued without prior written approval.

enforce the Uplift Rule until at least the end of the current legislative session, the Uplift Rule was not "necessary" for coping with the winter storm.[5]

19. The Uplift Rule, among other items, gave ERCOT discretion to "deviate from protocol requirements regarding the maximum amount of default uplift invoices." Per ERCOT Protocol Section § 9.19.1(1), the "Default Uplift Invoice" process must be used by ERCOT to collect outstanding "short pay amounts for all Settlement Invoices in a month" in order to pay the ERCOT market participants that are due payments, but have been short paid.

20. Pursuant to validly adopted ERCOT Protocol § 9.19.1, the maximum uplift charge permitted is $2,500,000 per month. The Protocol requires ERCOT to issue Default Uplift Invoices at least 30 days apart from each other, and prohibits ERCOT from issuing Default Uplift Invoices earlier than 90 days following "a short-pay of a Settlement Invoice on the date specified in the Settlement Calendar." Additionally, ERCOT Protocol § 9.19.2.1 specifies that payments of Default Uplift Invoices are due five business days after the invoice is received.[6]

21. The challenged Uplift Rule authorized "ERCOT to use its sole discretion in taking actions under the ERCOT Nodal Protocols to resolve financial obligations between a market participant and ERCOT." The authorized actions, among other things, gave ERCOT sole discretion to "deviate from protocol requirements regarding the maximum amount of default uplift invoices" effectively by edict authorizing ERCOT to determine for itself how and when to collect the massive default amounts caused by the Commission's February 15 and 16 orders.[7]

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[5] *See Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Project No. 51812, Electric Reliability Council of Texas, Inc.'s Notice of Planned Implementation of Default Uplift Invoice Process (Apr. 11, 2021).

[6] ERCOT Protocols § 9.19.2.1.

[7] Exhibit B.

22. ERCOT Protocols, like the PUC's rules, have the full force and effect of administrative rules adopted by a state agency. *Pub. Util. Comm'n v. Constellation Energy Commodities Grp.*, 351 S.W.3d 588, 595 (Tex. App.—Austin, 2011). Yet the Commission changed the existing ERCOT uplift rules and procedures by issuing the challenged Uplift Rule on the Commission's own motion, without opportunity for notice and comment (and without securing prior written approval by the Governor).

23. The unfettered discretion awarded to ERCOT by the Commission harms Exelon and market participants. It complicates the already challenging task of managing cash flows going forward for those market participants that have not defaulted, as it is unclear how much notice ERCOT will provide to market participants about the change in rules. Further, market participants do not know what percentage ERCOT will pay of the funds they are owed while at the same time they are required to meet their payment obligations to ERCOT. In some instances, this has led to a need to secure additional cash in the overnight lending market.

24. With the monthly Default Uplift Invoice cap eliminated, ERCOT now has sole discretion to determine how and when to collect this massive default amount, and thereby to determine who will be able to stay in the market and who will become a subsequent defaulting party. There is no need for ERCOT to have unfettered discretion with respect to Default Uplift Invoices. In the wake of the PUC's Load Shed Rule issued on February 15 and 16, which already have caused nearly $3 billion in defaults by market participants, with the final amounts yet to be determined, the PUC's *carte blanche* waiver of the Default Uplift Invoice cap threatens to drive even more participants out of the market, leaving creditworthy entities like Exelon to bear enormous default uplift charges.

25. The Uplift Rule has even caused some market participants to rush to the courthouse to carve themselves out of market uplift, thereby harming Exelon and other market participants by foisting a greater share of uplift on the market participants who have not taken such actions. For example, in *The City of Denton v. ERCOT*, Cause No. D-1-GN-21-001227, in the District Court of Travis County, Texas, 353rd Judicial District, the City of Denton sought and received a temporary restraining order from the Denton County district court restraining ERCOT from requiring the city to pay and Default Uplift Invoices, short-pay statement, or any obligation pursuant to Section 9.19 of the ERCOT Protocols. *See* First Extended Temporary Restraining Order, *City of Denton v. ERCOT,* Cause No. 21-1421-16, In the District Court of Denton County 16th Judicial District (Mar. 9, 2021) (transferred to Travis County District Court Cause No. D-1-GN-21-001227).

26. The Uplift Rule was not merely substantively and procedurally deficient; it stands to cause irreparable harm to market participants who will be affected by the imposition of enormous uplift charges or other market participants who seek to carve themselves out of bearing their proportionate share of the uplift due to the rule change. With the uplift cap eliminated, those defaults threaten to cause severe financial hardship, insolvency, business disruptions, restricted access to capital markets, credit rating downgrades, loss of goodwill and, for some, potentially bankruptcy, which has downstream negative impacts on the non-defaulting market participants.[8]

[8] *See generally Intercontinental Terminals Co., LLC v. Vopak N. Am., Inc.*, 354 S.W.3d 887, 895 (Tex. App.—Houston [1st Dist.], 2011); *Occidental Chem. Corp. v. ETC NGL Transp., LLC*, 425 S.W.3d 354, 364 (Tex. App.—Houston [1st Dist.], 2011); *Home Sav. of Am., F.A. v. Van Cleave Dev. Co.*, 737 S.W.2d 58, 59 (Tex. App.—San Antonio, 1987); *Digital Generation, Inc. v. Boring*, 869 F. Supp. 2d 761, 781 (N.D. Tex. 2012) (irreparable harm may be demonstrated by potential bankruptcy, business disruptions and by loss of goodwill, reputation, and credit rating).

Those left standing face the risk that they will have no adequate remedy at law as their defaulting commercial counterparties become insolvent.[9]

27. Exelon files this Petition for judicial review of the Commission's action.

V. STANDARD OF REVIEW

28. *De novo* review applies to the questions of law at issue in this suit for judicial review—including questions of textual interpretation of statutes and rules. *RR. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 624 (Tex. 2011); *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 631 (Tex. 2008); *State of Tex. v. Pub. Util. Comm'n of Tex.*, 246 S.W.3d 324, 332 (Tex. App.—Austin 2008, pet. denied).

29. When reviewing questions of textual interpretation, courts apply the plain terms of the statute or rule. *State of Tex.*, 246 S.W.3d at 332; *see also Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278, 284 (Tex. 1999). Deference is not due to an agency's interpretation that is inconsistent with unambiguous plain text. *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 43 (Tex. 2011) ("We defer only to the extent that the agency's interpretation is reasonable, and no deference is due where an agency's interpretation fails to follow the clear, unambiguous language of its own regulations.").

VI. SUMMARY

30. As a general rule, an administrative agency is a creation of the legislature, and thus, "only has the powers expressly conferred and those necessary to accomplish its duties." *State v. Public Util. Comm'n*, 883 S.W.2d 190, 194 (Tex. 1994). To determine whether the PUC acted

[9] *See Tex. Black Iron, Inc. v. Arawak Energy Int'l Ltd.*, 527 S.W.3d 579, 587 (Tex. App.—Houston [14th Dist], 2017) (a plaintiff does not have an adequate remedy at law if the defendant faces insolvency or becoming judgment proof before trial).

within the scope of its authority, its actions must be evaluated within the grant of authority. *Id.*; Tex. Gov't Code § 2001.174.

31. Chapter 39 of PURA was enacted to "protect the public interest during the transition to and in the establishment of a fully competitive electric power industry." Tex. Util. Code § 39.001(a). The statute expressly limits the PUC's ability to regulate market participants, stating that "electric services and their prices should be determined by customer choices and the normal forces of competition." *Id.* It also states that "regulatory authorities . . . may not make rules or issue orders regulating competitive electric services, prices, or competitors or restricting or conditioning competition except as authorized in this title" and that they "shall authorize or order competitive rather than regulatory methods to achieve the goals of this chapter to the greatest extent feasible and shall adopt rules and issue orders that are both practical and limited so as to impose the least impact on competition." *Id.* § 39.001(c), (d).

32. Section 39.151 of PURA addresses market structure. Section 39.151(a)(4) provides that ERCOT must "ensure that electricity production and delivery are accurately accounted for among the generators and wholesale buyers and sellers in the region." ERCOT fulfills that obligation by adopting Protocols that establish its rules for accepting payment from buyers of electricity, making payment to sellers of electricity, and making sure that ERCOT, as the market clearinghouse, stays whole to cover its costs. Section 39.151(d) expressly provides: "[t]he commission shall adopt and enforce rules related to the reliability of the regional electric network and accounting for the production and delivery of electricity among generators and all other market participants, or may delegate to an independent organization [ERCOT] responsibilities for establishing or enforcing such rules." ERCOT's Protocols are accordingly developed and revised

through a mandatory stakeholder process that is subject to oversight by the PUC. *See* ERCOT Protocol § 1.1(1).

33. On June 17, 2010, ERCOT adopted the $2.5 million monthly uplift cap in Nodal Protocol Revision Request 221 ("NPRR221") that Exelon and ERCOT market participants have relied upon for more than ten years. In the wake of nearly $3 billion in market default resulting from its Load Shed Rule, the Commission eliminated that rule by edict on February 21, 2021 with the Order.

34. The PUC failed to comply with PURA in issuing the Uplift Rule. The PUC did not consider the potentially disastrous effects its rule change would have on market participants. The Uplift Rule effectively gives ERCOT unlimited power to determine how much uplift market participants will bear each month without any information on whether such amounts will cause further bankruptcies or other financial challenges. The Uplift Rule directly violates the statutory requirements of PURA, is opposed to the statute's general objectives, and imposes significant and unreasonable conditions and burdens on the electric market.

35. The Order is also void in contravention of the substantive and procedural requirements set forth in the APA. In particular, the APA provides minimum standards of uniform practice and procedure for state agencies. Tex. Gov't Code §§ 2001.001–.902 It governs both rulemaking and contested-case adjudication. Rulemaking is required for any "agency statement of general applicability that: (i) implements, interprets, or prescribes law or policy; or (ii) describes the procedure or practice requirements of a state agency. *Id.* § 2001.003(6). Adjudication, on the other hand, occurs when "legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing." *Id.* § 2001.003(1).

36. The Commission's February 21 Uplift Rule permitting ERCOT to deviate from protocol requirements regarding the maximum amount of default uplift invoices is a rule, and Plaintiff brings suit for judicial review under Texas Government Code sections 2001.035 and 2001.038(a) to invalidate the rule. Alternatively, Plaintiff brings this suit for judicial review of the Commission's Uplift Rule pursuant to the contested-case review proceedings under Texas Government Code sections 2001.171-178 to avoid waiver.

37. Regardless of whether the Court characterizes the PUC's actions in promulgating the Uplift Rule as a "contested case proceeding" or a "rulemaking proceeding", the Commission violated the substantive and procedural requirements of PURA and the APA in issuing the Uplift Rule. The PUC also acted outside the limited grant of emergency authority issued by the Governor's disaster declaration. As such, the Uplift Rule is unlawful and should be reversed.

38. Alternatively, in issuing the Uplift Rule, the Commissioners acted outside the scope of their authority and engaged in *ultra vires* acts. Plaintiff is entitled to a declaratory judgment pursuant to Texas Civil Practice and Remedies Code sections 37.001-.011 that the Order is void.

VII. CAUSES OF ACTION

A. COUNT ONE: Challenge Pursuant to APA, Tex. Gov't Code § 2001.035, 038.

39. Plaintiff re-alleges all the foregoing paragraphs of this Original Petition for Judicial Review as if set forth herein.

40. The Commission's February 21, 2021 Uplift Rule is a "rule" in that it "implements, interprets, or prescribes law or policy" or "describes the procedure or practice requirements of a state agency" or it amends prior agency rules. *Id.* § 2001.003(6)(A), (B).

41. In promulgating the Uplift Rule, the Commission acted outside of its statutory authority and violated almost every single provision of the APA's mandatory provisions for the adoption of agency rules, including those that govern emergency rules, because, as described

below, they were not adopted "in substantial compliance with Sections 2001.0225 through 2001.034." *Id.* §§ 2001.035(a); *infra* ¶¶ 44-48. The Uplift Rule is therefore voidable. *Id.* § 2001.035(a). Because the Uplift Rule interferes with or impairs, or threatens to interfere with or impair, a legal right or privilege belonging to Plaintiff, the Order is void, and the Court should void the Order. *Id.* § 2001.038(a).

42. As described above, *supra* ¶¶ 31-34, the Uplift Rule contravenes PURA. It was issued outside the PUC's legal authority.

43. The Uplift Rule likewise exceeds the authority granted in the Governor's declaration. The declaration allows for the "suspension" of certain rules that may hinder actions necessary to protect life or property threatened by the declared disaster—it does not allow the PUC to modify the rules to give ERCOT *carte blanche* authority to eliminate a validly existing Protocol. Even if the Governor's declaration gave the PUC some authority to act, the PUC still had to comply with the terms of the declaration. It did not, but rather, acted far outside any potential authority. By so acting, the PUC erred and exceeded its authority.

44. Additionally, the Order is procedurally defective in multiple ways and failed to substantially comply with the APA procedural requirements for rule-making. The Commission violated Texas Government Code Section 2001.023 by issuing the Uplift Rule without providing at least 30 days' notice of its intention to adopt the rule prior to its adoption and failed to file notice of the proposed rule with the secretary of state for publication in the Texas Register.

45. The Commission violated Texas Government Code Section 2001.024 by issuing the Uplift Rule without providing notice that contains the information required by that section, including a brief explanation of the proposed rule, the text of the proposed rule, a statement of the

statutory or other authority under which the rule is proposed to be adopted, a note about public benefits and costs, and notice of which portions of any existing rules thereby amended.

46. The Commission violated Texas Government Code Section 2001.029 by issuing the Uplift Rule without giving Plaintiff or other interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing, prior to the rule's adoption.

47. The Commission violated Texas Government Code Section 2001.033 by failing to issue an order that contains a reasoned justification for the rule as adopted that contains a summary of comments received from parties interested in the rule, a summary of the factual basis for the Uplift Rule as adopted that demonstrates a rational connection between the factual basis for the rule and the rule as adopted, the reasons why the agency disagrees with party submissions and proposals, a concise restatement of the particular statutory provisions under which the rule is adopted and of how the agency interprets the provisions as authorizing or requiring the rule, and a certification that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

48. The Commission likewise violated Texas Government Code Section 2001.034 by failing comply with the APA's emergency rulemaking procedures when it issued the Uplift Rule, because the Commission failed to issue findings that an imminent peril to the public health, safety, or welfare, or a requirement of state or federal law, requires adoption of the rule on fewer than 30 days' notice, failed state in writing the reasons for its findings regarding imminent peril, and failed to file the rule with the Secretary of State.

49. Similarly, and in this regard, the Order violated the procedural limitation in the Governor's declaration to obtain written approval prior to any rule change.

50. The PUC's actions in excess of its legal authority and its failure to substantially comply with the APA rule-making provisions in promulgating the Uplift Rule interfere with or impair, or threaten to interfere with or impair, a legal right or privilege belonging to Plaintiff, *id.* § 2001.038(a).

51. In particular, the Uplift Rule threatens multiple market participants with further defaults or bankruptcies. This risk is exacerbated by the fact that under the Uplift Rule, market participants may have little or no notice as to the billing schedule or the size of the defaults uplifted to them. As one of the solvent market participants, Exelon is threatened with the risk that it will be forced to bear the market share of costs abandoned by others. Exelon will have no adequate remedy at law as ERCOT's defaulting commercial counterparties become insolvent.

52. These interferences and impairments were produced by an agency order promulgated in a manner entirely inconsistent with the PUC's statutory authority under PURA, the substantive and procedural limitations of the Governor's disaster declaration, and with the mandatory rule-making procedures proscribed by the APA. Because the Uplift Rule did not substantially comply with the PUC's legal obligations, Tex. Gov't Code § 2001.035, and because it impairs, or threatens to interfere with or impair, a legal right or privilege belonging to Plaintiff, the Uplift Rule should be invalidated and set aside. *Id.* § 2001.038(a).

B. COUNT TWO: Challenge Pursuant to APA, Tex. Gov't Code §§ 2001.171.-178

53. Plaintiff re-alleges all the foregoing paragraphs of this Original Petition for Judicial Review as if set forth herein.

54. A contested case is defined under the APA as "a proceeding, including a ratemaking, a licensing proceeding, which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing." *Id.* § 2001.003(1).

To the extent the PUC proceeding adopting the Uplift Rule is found to be a "contested case" proceeding, the Uplift Rule should be reversed pursuant to APA sections 2001.171 and 2001.174.

55. APA section 2001.174 requires a court to reverse an improper agency final order "if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are":

> (A) in violation of a constitutional or statutory provision;
>
> (B) in excess of the agency's statutory authority;
>
> (C) made through unlawful procedure;
>
> (D) affected by other error of law;
>
> (E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or
>
> (F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id. § 2001.174.

56. As described herein, the Uplift Rule offends section 2001.174 in multiple ways.

57. To begin, the Uplift Rule violates the PUC's statutory authority under PURA. *Supra* ¶¶ 31-34. Additionally, as described above the Uplift Rule failed to comply with the Governor's disaster declaration, and thus it is affected by another error of law. Tex. Gov't Code § 2001.174(D).[10] The PUC both exceeded the limited authority granted in the declaration and violated its procedural requirements. *Supra* ¶¶ 43-49. The PUC erred and exceeded its authority, and accordingly, the Uplift Rule should be reversed, as set forth above.

58. The PUC also failed to comply with many APA procedural requirements, including providing Plaintiff with (1) a hearing, (2) the opportunity to present evidence and argument on

[10] Governor Abbott Issues Disaster Declaration in Response to Severe Winter Weather in Texas, *available at* https://gov.texas.gov/news/post/governor-abbott-issues-disaster-declaration-in-response-to-severe-winter-weather-in-texas (Feb. 12, 2021).

each issue in the case, and (3) adequate notice. Tex. Gov't Code §§ 2001.051-052; *id.* § 2001.174(C). The Uplift Rule is also not supported by substantial evidence. *Id.* § 2001.174(E). The Commission failed to establish an adequate record in support of its decision, *id.* § 2001.060, failed to follow the APA's decisional timelines, *id.* § 2001.143, and failed to issue "findings of fact and conclusions of law, separately stated" and that were "based on evidence and on matters that [were] officially noticed", *id.* § 2001.141(b), (c). The Uplift Rule was, thus, issued in violation of the PUC's statutory authority and through unlawful procedure. *Id.* § 2001.174(A)-(C).

59. The Uplift Rule also violates Exelon's constitutional due process rights. *Id.* § 2001.174(A). Due process "at a minimum requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *Mosley v. Tex. Health & Hum. Servs. Comm'n*, 593 S.W.3d 250, 265 (Tex. 2019) (internal quotation omitted). The Commission provided no notice or opportunity to be heard before promulgating the Uplift Rule.

60. The Uplift Rule is arbitrary and capricious because it imposed an unreasonable and undefined process whereby ERCOT would be permitted to recover uplift charges in any manner it chose, without any of the limitations and procedures established through the ERCOT protocol process. Tex. Gov't Code § 2001.174(F). In issuing the Uplift Rule, the Commission did not consider the likely impact on Plaintiff and other similarly situated market participants.

61. Accordingly, the Uplift Rule constitutes reversible error as a matter of law. *Id.* § 2001.174.

C. COUNT THREE: *Ultra Vires* Claim under the Uniform Declaratory Judgments Act

62. Plaintiff re-alleges all the foregoing paragraphs of this Original Petition for Judicial Review as if set forth herein.

63. The Uniform Declaratory Judgments Act permits an *ultra vires* cause of action for prospective relief against a state official in an official capacity when the official acts outside the

scope of his or her legal authority. *Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621 (Tex. 2011); *Heinrich*, 284 S.W.3d at 372; *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002) ("Private parties may seek declaratory relief against state officials who allegedly act without legal or statutory authority."); Tex. Civ. Prac. & Rem. Code § 37.006(b).

64. As described herein, PUCT Commissioners acted without legal authority in promulgating the Uplift Rule. *Supra* ¶¶ 31-38, 41-52, 57-61.

65. Section 39.151(d) of the Texas Utilities Code expressly states "[t]he commission shall adopt and enforce rules relating to the reliability of the regional electrical network and accounting for the production and delivery of electricity among generators and all other market participants, or may delegate to an independent organization responsibilities for establishing or enforcing such rules." The PUC's validly adopted agency rule, 16 Tex. Admin. Code § 25.362(c), addresses the adoption of rules by ERCOT and commission review. It requires: "ERCOT shall adopt and comply with procedures concerning the adoption and revision of ERCOT rules. (1) The procedures shall provide for advance notice to interested persons, an opportunity to file written comments or participate in public discussions, and, in the case of market protocols, operating guides, planning guides, and market guides, an evaluation by ERCOT of the costs and benefits to the organization and the operation of electricity markets." The PUC Commissioners accordingly violated this rule by giving ERCOT discretion to ignore this rule.

66. The Commissioners' illegal and unauthorized acts were not acts of the State. *Heinrich*, 284 S.W.3d at 372. Exelon's claim for declaratory relief is not a suit to alter governmental policy, but to enforce governmental policy, and therefore is not barred by the State's sovereign immunity. *Id.* Exelon is entitled to declaratory relief.

VIII. PRAYER FOR RELIEF

Plaintiff respectfully requests that citation be issued and that upon final hearing, the Court:

1. Render a declaratory judgment that the Commission's Uplift Rule is a rule that interferes with or impairs, or threatens to interfere with or impair, a legal right or privilege of Plaintiff and declares the rule void and invalid;

2. Alternatively, reverse the Commission's Uplift Rule and remand to the Commission for further proceedings;

3. Alternatively, render a declaratory judgment that the Commissioners acted *ultra vires* in issuing the void Uplift Rule;

4. Further alternatively, issue an order directing the Commission, through its Chair and Commissioners, to withdraw the void Uplift Rule and/or issue a permanent injunction prohibiting the Commission from enforcing the Order; and

5. Grant such other and additional relief to which Plaintiff has shown itself to be entitled.

Respectfully submitted,

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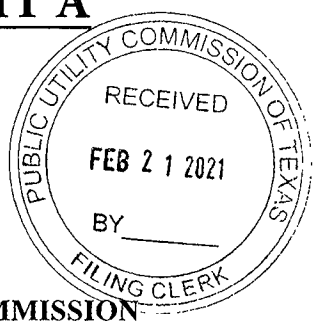
EXHIBIT A

EXHIBIT A



PROJECT NO. 51812

ISSUES RELATED TO THE STATE OF DISASTER FOR THE FEBRUARY 2021 WINTER WEATHER EVENT	**§ § §**	**PUBLIC UTILITY COMMISSION OF TEXAS**

ORDER DIRECTING ERCOT TO TAKE ACTION AND GRANTING EXCEPTION TO ERCOT PROTOCOLS

Through this Order the Commission directs the Electric Reliability Council of Texas (ERCOT) to take certain actions and grants exception to provisions of the ERCOT Nodal Protocols and Operating Guides.

In an attempt to protect the overall integrity of the financial electric market in the ERCOT region, the Commission concludes it is necessary to authorize ERCOT to use its sole discretion in taking actions under the ERCOT Nodal Protocols to resolve financial obligations between a market participant and ERCOT. It is appropriate that ERCOT's discretion include, but not be limited to, ERCOT's ability to take the following actions:

- Deviate from protocol deadlines and timing related to settlements, collateral obligations, and invoice payments;
- Utilize available funds, such as undistributed congestion revenue right auction revenues, to cover short-paying invoice recipients;
- Relax credit requirements and releasing cash or other collateral to provide short-term market-participant liquidity;
- Deviate from protocol requirements regarding the maximum amount of default uplift invoices;
- Suspend breach notifications to certain market participants for failure to make payment or provide financial security; and
- Produce reconciliation settlements following market stabilization.

PURA § 39.151(d)[1] gives the Commission complete authority over ERCOT, the independent organization certified by the Commission under PURA § 39.151. In addition, ERCOT is required to "administer settlement and billing for services provided by ERCOT, including assessing creditworthiness of market participants and establishing and enforcing

[1] Public Utility Regulatory Act, Tex. Util. Code §§11.001–66.016.

reasonable security requirements in relation to their responsibilities under ERCOT rules."[2] Further, ERCOT must perform any additional duties required by commission order.[3]

This order does not relieve market participants of payment or financial security obligations with ERCOT. Moreover, market participants remain liable for all charges associated with any activity related to its relationship with ERCOT and any expenses arising from the consequences of termination of a market participant's agreements with ERCOT or revocation of the market participant's rights to conduct activities with ERCOT.

I. Orders

For the reasons discussed above, the Commission issues the following orders:

1. ERCOT must exercise its sole discretion to resolve financial obligations between a market participant and ERCOT as provided by this Order.
2. Any and all provision of the ERCOT Nodal Protocols are waived to the degree necessary to allow ERCOT to take the actions ordered herein.
3. ERCOT must report to the Commission twice each day, beginning February 22, 2021, of the the actions it has taken in response to this Order.
4. ERCOT must direct any questions regarding its obligations under this Order to the Commission's Deputy Executive Director or her designee..

[2] 16 Tex. Admin. Code § 25.361 (b)(2).

[3] *Id* § 25.361(b)(16).

Signed at Austin, Texas the 21st day of February 2021.

PUBLIC UTILITY COMMISSION OF TEXAS

DEANN T. WALKER, CHAIRMAN

ARTHUR C. D'ANDREA, COMMISSIONER

SHELLY BOTKIN, COMMISSIONER

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EXHIBIT B

EXHIBIT B

FILED

PROJECT NO. 51812

2021 MAR 13 PM 2:08

ISSUES RELATED TO THE STATE OF DISASTER FOR THE FEBRUARY 2021 WINTER WEATHER EVENT	§ § §	PUBLIC UTILITY COMMISSION OF TEXAS

EXELON GENERATION COMPANY, LLC'S EXPEDITED MOTION FOR RELIEF AND REHEARING OF FEBRUARY 21 ORDER DIRECTING ERCOT TO TAKE ACTION AND GRANTING EXCEPTION TO ERCOT PROTOCOLS

TO THE HONORABLE COMMISSIONERS:

Exelon Generation Company, LLC ("Exelon")[1] respectfully files this Expedited Motion for Relief and Rehearing ("Motion") of a discrete ruling contained in the Public Utility Commission of Texas ("Commission" or "PUCT") Order Directing ERCOT to Take Action and Granting Exception to ERCOT Protocols issued on February 21, 2021 ("Order"). The Order was issued *sua sponte* and did not follow rulemaking, emergency rulemaking or contested case procedures under the Texas Administrative Procedure Act ("Administrative Procedure Act" or "APA").[2] Out of an abundance of caution and pursuant to APA § 2001.146 and Public Utility Commission of Texas ("Commission" or "PUCT") Procedural Rule § 22.264, Exelon submits this Motion to request expedited reconsideration of the aspect of the Order that granted ERCOT the right to deviate from existing protocol requirements related to default uplift invoices, and to preserve Exelon's rights to judicial review. No exigent circumstances justified this aspect of the Order, which grants ERCOT unbounded discretion to determine the amounts and the schedule for recovering default uplift payments from market participants. While this ruling appears limited and

[1] Exelon Generation Company, LLC, through subsidiaries, owns 3,620 MWs of gas-fired capacity and 87 MWs of wind power in Texas. Exelon's subsidiary, Constellation New Energy, Inc., also provided approximately 14 TWh of competitive retail supply to residential and commercial/industrial load in 2020. Exelon Generation Company, LLC also provides wholesale supply to a number of Texas cooperatives and municipalities.

[2] Tex Gov't Code §§ 2001.001-.903.

discrete, the discretion awarded to ERCOT will allow it to unilaterally determine how over *$3 billion* in short-pays will be recovered from the non-defaulting market participants left standing after the first round of defaults. In short, the order allows a free for all at precisely the time when the Commission should be conducting an open, public process, consistent with the APA and the Commission's own rules, to develop rules and procedures for addressing market defaults that carefully balance the interests of consumers, the future of the ERCOT market, and fundamental fairness to the market participants who have not defaulted on their obligations. In support thereof, Exelon would respectfully show as follows:

ARGUMENT

On February 21, the Commission, on its own motion and without the opportunity for notice and comment, adopted an order "authorizing ERCOT to use its sole discretion in taking actions under the ERCOT Nodal Protocols ("ERCOT Protocols") to resolve financial obligations between a market participant and ERCOT." The authorized actions, among other items, gave ERCOT discretion to "deviate from protocol requirements regarding the maximum amount of default uplift invoices."[3] The maximum uplift charge permitted by the ERCOT Protocols is $2,500,000 per month,[4] an amount arrived at through ERCOT's lengthy protocol revision process, which was designed to protect market participants and consumers. Protocol 9.19.1 provides, in pertinent part:

> (4) Any uplifted short-paid amount greater than $2,500,000 must be scheduled so that no amount greater than $2,500,000 is charged on each set of Default Uplift Invoices until ERCOT uplifts the total short-paid amount. ERCOT must issue Default Uplift Invoices at least 30 days apart from each other.
>
> (5) ERCOT shall issue Default Uplift Invoices no earlier than 90 days following a short-pay of a Settlement Invoice on the date specified in the Settlement Calendar. The Invoice Recipient is

[3] Order Directing ERCOT To Take Action and Granting Exception to ERCOT Protocols (Feb. 21, 2021).
[4] ERCOT Protocols § 9.19.1.

> responsible for accessing the Invoice on the MIS Certified Area once posted by ERCOT.

Once default uplift invoices are issued, payments of default uplift invoices are due five business days after the invoice is received.[5] In the wake of the PUCT's repricing orders issued on February 15 and 16, which already have caused more than *$3 billion* in defaults by market participants as of March 11, 2021, with the final amounts yet to be determined, this aspect of the Order now threatens to drive even more participants out of the market, as they could now be made to bear enormous default uplift charges. With the maximum default uplift rule eliminated, ERCOT now has sole discretion to determine how and when to collect this massive default amount, and thereby to determine who will be able to stay in the market and who will become a subsequent defaulting party. The unfettered discretion that the Commission awarded ERCOT also complicates the already challenging task of managing cash flows going forward for those market participants that have not defaulted, as it is unclear how much notice ERCOT will provide to market participants about the change in rules. There is good cause for concern: ERCOT thus far has not been transparent with respect to short-pay and uplift expectations, which means that market participants have not known what percentage ERCOT will pay of the funds that they are owed while at the same time they are required to meet their payment obligations to ERCOT. In some instances, this has led to a need to secure additional cash in the overnight lending market. While thus far Exelon has been able to manage these challenges, there is absolutely no need for ERCOT to have unfettered discretion with respect to default uplift invoices, which would typically only begin to be collected 90 days after the short-pays occur.

Good cause to grant this Motion on an expedited basis exists in light of the imminent peril to the ERCOT market as a result of the extraordinary uplift, pending legislative efforts to address

[5] ERCOT Protocols § 9.19.2.1.

recent events at ERCOT, and a desire by some market participants to rush to the courthouse to individually exclude themselves from the impending uplift, thereby harming all other market participants with a greater potential share of uplift. The Order was not merely procedurally deficient; it stands to cause irreparable harm to market participants who will be affected by the imposition of enormous uplift charges. We have already seen the impact of the Commission's administrative pricing Orders of February 15 and 16, with an electric cooperative, retail providers and others defaulting on large obligations to ERCOT.[6] Now, with the uplift cap eliminated, those defaults imminently threaten to cause severe financial hardship, insolvency, business disruptions, restricted access to capital markets, credit rating downgrades, loss of goodwill and, for some, potentially bankruptcy, which has downstream negative impacts on the non-defaulting market participants.[7] Those left standing face the imminent risk that they will have no adequate remedy at law as their defaulting commercial counterparties become insolvent.[8] The Commission's March 12, 2021 order extending the ERCOT dispute filing deadline for settlement/resettlement statements for operating days February 12–19, which would otherwise be required within 10 business days, for an additional six months, simply adds to the imperative that ERCOT not collect default uplift in accordance with its own discretionary schedule.[9] Exelon, accordingly, urges the Commission to rescind this aspect of its order on an expedited basis, and open a rulemaking and/or evidentiary proceeding so that the uplift problem can be addressed by the Commission in due

[6] ERCOT Market Notice, W-B022621-01 (Feb. 26, 2021).
[7] *See generally Intercontinental Terminals Co , LLC v. Vopak N. Am., Inc* , 354 S.W.3d 887, 895 (Tex. App.—Houston [1st Dist.], 2011); *Occidental Chem. Corp. v. ETC NGL Transp., LLC*, 425 S.W.3d 354, 364 (Tex. App.—Houston [1st Dist.], 2011); *Home Sav. of Am., F.A v. Van Cleave Dev Co.*, 737 S W.2d 58, 59 (Tex. App.—San Antonio, 1987); *Digital Generation, Inc. v. Boring*, 869 F. Supp. 2d 761, 781 (N.D. Tex. 2012) (irreparable harm may be demonstrated by potential bankruptcy, business disruptions and by loss of goodwill, reputation, and credit rating).
[8] *See Texas Black Iron, Inc. v. Arawak Energy Int'l Ltd.*, 527 S.W.3d 579, 587 (Tex. App.—Houston [14th Dist], 2017) (a plaintiff does not have an adequate remedy at law if the defendant faces insolvency or becoming judgment proof before trial).
[9] ERCOT Protocols § 9.14.2(3).

course, in substantial compliance with its rules, and upon a reasoned agency record. Exelon also files this Motion to preserve its right to judicial review of the Commission's action.

LEGAL ANALYSIS AND POINTS OF ERROR

The Commission's February 21 Order imposed new default uplift obligations on market participants without any opportunity for public comment, hearing, or presentation of evidence or argument. The Order was issued pursuant to the Commission's claimed authority under Texas Public Utility Regulatory Act[10] ("PURA") § 39.151(d). As described below, the Order was issued through an unlawful procedure in excess of the Commission's statutory authority; did not substantially comply with the Administrative Procedure Act; violated affected parties' due process rights; and the decision that it reached was not in substantial compliance with the APA or supported by any evidence.

A. Point of Error 1: The Order Was Made Through Unlawful Procedure Because It Was Not Adopted Under Any Process Described in the Administrative Procedure Act or PURA.

Under the Texas Administrative Procedure Act, state agencies are charged with providing an opportunity for public participation in the rulemaking process and providing an opportunity for hearing and participation in any contested case proceeding that determines the legal rights, duties or privileges of a party.[11] PURA § 39.003 confirms the scope of the Commission's authority to act within the competitive power market, stating: "Unless specifically provided otherwise, each commission proceeding under [Chapter 39 of PURA], other than a rulemaking proceeding, report, notification, or registration, shall be conducted as a contested case."[12]

[10] Tex. Util. Code §§ 11.001-66.016 (West 2019).
[11] *See* Tex. Gov't Code §§ 2001.001, 2001.0003(1), 2001.029, 2001.051.
[12] Tex. Util. Code § 39.003.

With respect to the operation of the competitive market, PURA § 39.151(d) directs the Commission to "adopt and enforce rules relating the reliability of the regional electric network and accounting for the production and delivery of electricity among generators and all other market participants."[13] The Commission "may delegate to an independent organization responsibilities for establishing or enforcing such rules."[14] Rules adopted and enforcement actions taken by the independent organization are subject to Commission oversight and review.[15]

The Order was issued through an unlawful procedure that exceeds the Commission's statutory authority because, as explained further below, the Order revised the ERCOT Protocols, which have the force of agency rules, and determined the legal rights of market participants without complying with either rulemaking or contested case procedures. As such, the Order is unlawful, exceeds the Commission's statutory authority, and should be reconsidered by the Commission, in whole or in part, on that basis.

B. Point of Error 2: The Commission Failed to Substantially Comply with the Administrative Procedure Act's Rulemaking Procedures and Violated its Own Procedural Rules With Respect to Rulemaking

The ERCOT Protocols have the force and effect of administrative rules adopted by a state agency.[16] As such, the Order may properly be characterized as amending or modifying existing administrative rules. In particular, it modified the ERCOT Protocols by permitting ERCOT to "[d]eviate from protocol requirements regarding the maximum amount of default uplift invoices," which allowed ERCOT to bypass the nodal protocol revision process.

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[13] *Id.* at § 39.151(d).
[14] *Id*
[15] *Id*
[16] *See PUCT v. Constellation Energy Commodities Grp.*, 351 S.W.3d 588, 595 (Tex. App.—Austin, 2011).

The Commission must adopt any new administrative rules, as well as amendments to existing rules, pursuant to the rulemaking processes set forth in the APA and the Commission's Procedural Rules.[17] The Commission may initiate a rulemaking on its own motion by publishing notice of the proposed rule in accordance with the APA, which requires that public notice be provided at least 30 days prior to adopting the proposed rule and that the proposed rule be filed with the Secretary of State for publication in the *Texas Register*.[18] The Commission must afford all interested persons a reasonable opportunity to submit data, views and arguments in the form of written comments on the rule, and must grant a public hearing if requested by 25 persons, a governmental subdivision or agency, or an association with at least 25 members.[19]

A rule is voidable unless a state agency adopts it in substantial compliance with the procedures described above.[20] The ERCOT Protocol changes directed by the Order do not meet this substantial compliance standard. Market participants received no notice of the proposed rule revisions and had no opportunity to submit written comments or participate in a public hearing on their adoption. As a result, the rule changes directed by the Order were not adopted in substantial compliance with the Administrative Procedure Act.

The lack of clear process also disrupts market participants' rights to obtain judicial review. For PUCT rule changes, the normal appellate process is to bring a declaratory judgment action asking a court to determine "the validity or applicability of a rule, including an emergency rule" adopted pursuant to the APA.[21] PURA § 39.001(f) further prescribes: "[a] person who challenges the validity of a competition rule must file a notice of appeal with the court of appeals and serve

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[17] *See generally* APA Subchapter B, *Rulemaking*; *see also* Tex Gov't Code § 2001.003(6) (defining "rule" as including "the amendment or repeal of a prior rule").
[18] Tex. Gov't Code § 2001.023; 16 Tex. Admin. Code §§ 22.281(b), 22.282(b).
[19] Tex. Gov't Code § 2001.029; 16 Tex. Admin. Code § 22.282(c),(d).
[20] *See* Tex. Gov't Code § 2001.035 ("A rule is voidable unless a state agency adopts it in substantial compliance with Sections 2001.0225 through 2001.34.").
[21] Tex. Gov't Code § 2001.038.

the notice on the commission not later than the 15th day after the date on which the rule as adopted is published in the Texas Register." In the face of an agency order that failed to clearly follow either rulemaking or contested case procedures, it is imperative that the Commission reconsider the Order in light of the impending disastrous consequences thereof.

Finally, Exelon notes that the Commission's responsibility to follow the rulemaking procedures of the Administrative Procedure Act and its own Procedural Rules is in no way limited by its separate responsibility to conduct oversight of ERCOT's business operations. The Order states that the Commission has "'complete authority' over ERCOT," citing PURA § 39.151. In context, that provision of PURA gives the Commission "complete authority to oversee and investigate [ERCOT's] finances, budget and operations as necessary to ensure the organization's accountability and to ensure that the organization adequately performs the organization's functions and duties."[22] This general duty to oversee ERCOT's administrative operations is distinct from the Commission's power to delegate its rulemaking authority to ERCOT and to then review and revise those rules, which powers are separately addressed in the same provision of PURA.[23] Nor would it be sensible to conclude that the Commission can avoid the state's administrative rulemaking process altogether by delegating its rulemaking authority to ERCOT and thereafter altering any ERCOT rule, by any method it chooses, at any time, as an exercise of its "complete authority."[24]

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[22] Tex. Gov't Code § 39.151(d).

[23] *Id.*

[24] Nor does the Commission's Substantive Rule § 25.501 or Procedural Rule § 22.5 authorize any ad-hoc adoption of new administrative rules outside of the process mandated by the APA. The Texas Supreme Court has held that an administrative agency cannot adopt rules permitting it to stray from the minimum requirements of the APA. *Mosley v Texas Health & Hum Servs Comm'n*, 593 S W.3d 250, 261 (Tex. 2019) ("Whatever an agency's authority is under [APA § 2001.004, *Requirement to Adopt Rules of Practice*], it cannot extend to contravening the APA's express requirements. The APA's purpose is to 'provide minimum standards of uniform practice and procedure for state agencies.' *Id.* § 2001.001(1). It would be self-defeating for the APA to allow an agency to use the rulemaking process to sidestep its requirements.").

C. Point of Error 3: The Commission Failed to Substantially Comply with the Administrative Procedure Act's Emergency Rulemaking Procedures and Violated its Own Procedural Rules With Respect to Emergency Rulemaking.

The Commission can bypass the prior notice and comment requirements of APA §§ 2001.023 and 2001.029 by adopting an emergency rule pursuant to APA § 2001.034 and PUCT Procedural Rule § 22.283, which require only that (1) the rule's preamble include a finding that "an imminent peril to the public health, safety, or welfare, or a requirement of state or federal law, requires adoption of a rule on fewer than 30 days' notice" and stating a reason for that finding, and (2) the emergency rule and written reasons for its adoption be provided to the office of the Secretary of State for publication in the *Texas Register*.[25] However, the Order did not contain the required finding to support the adoption of an emergency rule, and there has been no publication thereof in the *Texas Register*.

Moreover, these failures were not mere technical defects or oversight in drafting; it is clear that the rule change effected by the Order was not required to prevent any immediate peril to public health, safety or welfare. Given ERCOT's existing restriction on issuing a default uplift invoice any earlier than 90 days following a short-pay of a Settlement Invoice,[26] there is clearly time to allow for reasoned consideration of the appropriate path. The schedule and caps that ERCOT adopts with respect to the default uplift invoices have the potential to greatly exacerbate the crisis. Further cascading defaults are not in the public interest. It is prudent and consistent with the public interest for ERCOT and the PUCT to stop, reassess the state of the market, and consult with the remaining market participants concerning what those entities can bear. Then and only then, should ERCOT move forward with collections in accordance with a schedule that allows for planning, and in amounts that are likely to minimize the risk of additional defaults. The previous rules gave

[25] Tex. Gov't Code § 2001.034; 16 Tex. Admin. Code § 22.283.
[26] ERCOT Protocols § 9.19.1(5).

market participants certainty as to the schedule of default uplift invoices, and more importantly, that the amounts of such invoices could be borne by market participants without significant disruption. Any change to the rules should be designed to achieve the same goals, recognizing that these are not normal times.

D. Point of Error 4: The Commission Violated APA § 2001.051 and its Own Procedural Rules With Respect to Contested Cases, Acted in Excess of Its Statutory Authority, and Followed an Unlawful Procedure

A state agency may also issue a final order affecting the rights of parties in a contested case proceeding conducted in accordance with the APA. Nonetheless, the Commission's issuance of the Order was not preceded by any of the primary features of a contested case; there has been no opportunity for interested parties to participate in a hearing or to respond and present evidence and argument, each of which are required under APA § 2001.051. No factual record was developed to support the decisions made in the Order. Nor did the Order contain the required elements of a final order in a contested case, as it does not include "findings of fact and conclusions of law, separately stated."[27] Nor did the Order issue in a Commission docket styled as a contested case, but rather it was filed in a "project" docket with the caption, "Issues Related to the State of Disaster for the February 2021 Winter Weather Event." As such, the Commission violated APA § 2001.151 by issuing an order affecting Exelon's and others' rights without providing the right to participate in a hearing or present evidence and argument, and in doing so the Commission exceeded its statutory authority as a state agency and instead followed an unlawful procedure when it issued the Order.

We note that the Commission's Procedural Rules set out a specific contested-case process that may be used to review ERCOT's rules and conduct. Procedural Rule § 22.251 permits the filing of a complaint regarding ERCOT's conduct, including its promulgation of any "procedures

[27] Tex. Gov't Code § 2001.141 (b); 16 Tex. Admin. Code § 22.263(2).

. . . accounting for the production and delivery of electricity among generators and other market participants," which process may be initiated by Commission staff.[28] Thus, a contested case could have been initiated under Procedural Rule § 22.251. This would have allowed interested parties to participate in review of ERCOT's default uplift process and to develop a record of evidence supporting any revised rule. Procedural Rule § 22.251 also permits the Commission to suspend the operation of any ERCOT rule that is the subject of review and to expedite the contested proceeding, each following a showing of good cause.[29] Despite the availability of these processes, the Commission afforded interested parties no right to participate in the decision to alter critical features of the ERCOT Protocols and now leaves them with great uncertainty as to how they may seek judicial review.

E. Point of Error 5: The Commission Did Not Act Within the Authority Granted by the Governor's Emergency Proclamation

The Governor's February 12 emergency proclamation permitted the suspension of "any regulatory statute prescribing the procedures for conduct of state business or any order or rule of a state agency that would in any way prevent, hinder, or delay necessary action in coping with this disaster," but only provided for such a suspension "upon written approval of the Office of the Governor."[30] There is no record evidence or other indication that Commission requested or obtained written approval of the Governor to suspend the normal operation of the Administrative Procedure Act before issuing the Order and fundamentally altering the ERCOT Protocols. Thus, it is clear that the Governor's proclamation does not grant the Commission any additional authority or affect any analysis as to whether the Commission adopted new ERCOT Protocols in substantial

[28] 16 Tex. Admin. Code § 22.251(b),(c).
[29] *See id.* at § 22.251(i),(k).
[30] Disaster Proclamation of Gov. Greg Abbott dated Feb. 12, 2021.

compliance with the APA, or whether it acted in violation of PURA or the APA or otherwise in excess of its authority when it issued the Order.

F. Point of Error 6: The Order Violates the Due Process Rights of ERCOT Market Participants, Who Have a Right to Comment and Hearing, or at a Minimum, to Judicial Review

As explained above, the Commission did not follow the procedures set forth in the Administrative Procedure Act in issuing the Order. Generators, retail electric providers, marketers and cooperatives who may ultimately be driven from the ERCOT market by the Commission's default uplift decision had no opportunity to comment on that decision, no opportunity for a hearing, and no opportunity to present evidence or arguments. In addition, the right of affected parties to seek judicial review of the Commission's Order has been fundamentally jeopardized because the Commission has neither clearly issued a final, appealable order nor has it properly promulgated a new rule, leaving parties to guess what process they can follow to obtain review of the Commission's actions.

Procedural due process "at a minimum requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner" before a person can be deprived of a vested property interest.[31] Property interests protected by due process include, at the very least, ownership of money.[32] By denying Exelon and others the opportunity to provide written comments or arguments prior to issuing the Order, and by now impairing their right to judicial review in acting outside of any authorized procedure, the Commission has violated those parties' right to procedural due process. The Order also violates the substantive due-course-of-law protection provided in Article I, Section 19 of the Texas Constitution because its effects are so burdensome as to be oppressive in

[31] *Mosley v. Texas Health & Hum. Servs Comm'n*, 593 S.W.3d 250, 265 (Tex. 2019) (internal quotation omitted).
[32] *Matzen v. McLane*, 604 S.W.3d 91, 113 (Tex. App.—Austin, 2020).

light of the governmental interest served.[33] The financial stability of the ERCOT market can be ensured by a variety of more equitable methods, including spreading uplifts out over time and obtaining securitization financing, so it is clearly oppressive to force market participants to bear enormous short-term uplift charges that could force them into bankruptcy or severe financial distress due to the defaults of others. It is imperative that the Commission reconsider its Order and provide affected market participants a clear pathway to judicial review. Moreover, we ask that the Commission initiate a rulemaking process or contested case and consider interested parties' comments and arguments with respect to the ERCOT Protocol revisions described in the Order. The Commission and the ERCOT market as a whole will benefit from carefully considering all options and crafting a solution that will provide fair outcomes for all market participants and consumers.

CONCLUSION

It is imperative that the Commission reconsider its decision to allow ERCOT to impose an unlimited amount of default uplift pursuant to a schedule determined in its unfettered discretion. Considering the unprecedented defaults reported by ERCOT, the maximum amount of monthly default uplift is a policy decision that will have broad impacts on the market. As such, it should not be arrived at in private conversations at ERCOT, but instead should be considered by the Commission in an open, public process, consistent with the APA and the Commission's own rules. It is not in the public interest to delegate to ERCOT a decision that could cause further cascading defaults, force generators and load-serving entities out of the market, and ultimately increase costs to consumers. Again, the absence of any reasoned explanation for the decision to give ERCOT such discretion and the lack of any agency comment or evidentiary record show that the

[33] *See Patel v. Texas Dep't of Licensing & Regul.*, 469 S.W.3d 69, 87 (Tex. 2015).

Commission's decision to lift the maximum default uplift charge was not reasonably supported by evidence and should be reconsidered.

For the foregoing reasons, Exelon respectfully requests that the Commission grant the following relief:

> (1) Issue an order rescinding ERCOT's ability to waive standard uplift protocols, including the $2.5 million limit, and open a project and rulemaking to address this issue.
>
> (2) Open a rulemaking and/or evidentiary proceeding to consider matters related the uplift.

Exelon also requests all other relief to which it may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that notice of the filing of this document was provided to all parties of record via electronic mail on March 18, 2021, in accordance with the Order Suspending Rules, issued in Project No. 50664.

/s/ Jennifer Ferri
Jennifer Ferri